

Amended claims 1 and 14 and the remaining claim 4 directly depend on claim 1, define Applicants' invention in terms of "consisting essentially of". The transitory term "consisting essentially of" is a term of art having an accepted meaning in chemical as well as pharmaceutical patent practice. *Carter Wallace Inc. v. Gillette Co.*, 531 F.Supp. 840, 874 n.29., 211 USPQ 499, 527 n.29 (Mass. 1981). The use of this term renders the claim(s) open only for the inclusion of unspecified ingredients which do not materially affect the basic and novel characteristics of the composition. *Ex parte Davis & Tuukkanen*, 80 USPQ 448, 450 (POBA 1948). Thus, the stabilizer of PEIGNIER is excluded from Applicants' claimed invention.

PEIGNIER reveals as a stabilizer a mixture of xanthan gum and carob gum. Applicants' have discovered that their suspension needs only a single nutrient stabilizer, including xanthan gum, and not a mixture of xanthan gum plus carob gum. Applicants' have defined their invention in terms of "a hydrocolloid" in claims 14 "or a single hydrocolloid" in 1 and specific hydrocolloids in claim 4 which do not include a mixture of xanthan gum plus carob gum.

PEIGNIER reveals the criticality of the carob gum whose inclusion affects the stability of the suspensions revealed therein. In this regard, reference is made to PEIGNIER at col. 1, lines 32-35, and 54-60, where it is stated:

... Even with ... xanthan gum the solid particles tend to **sediment** ... ;
(emphasis added); and

It has now unexpectedly been discovered ... that in an aqueous medium very small amounts of a **mixture** of xanthan gum and carob gum, and optionally starch, enable the realization of great capacity for significantly **enhanced suspension** *vis-à-vis* the prior art ... (emphasis added), respectively; and at

Col. 3, lines 11-14, where it is stated:

... The subject suspensions have improved stability and dispersibility properties with respect to the use of xanthan gum alone, in the same

C

proportions. These properties enable their application in all food or industrial fields.

Additionally, the suspensions of PEIGNIER which are stabilized with the mixture (xanthan gum plus carob gum) are not suspensions of nutrients, as defined by Applicants. PEIGNIER deals primarily with inorganic pigments and other inorganics. In this regard, reference is made to PEIGNIER at col. 3, lines 21-27, where it is stated:

. . . Exemplary of such solid, water insoluble particles, the following are representative: pigments, such as titanium oxide; abrasive particles, such as cerium oxide; mineral or inorganic fillers, such as magnesium oxide, calcium carbonate, iron oxide; seeds; fruit pulp; pesticides, insecticides; and a variety of other water insoluble materials.

Reference is also made to EXAMPLES 1 (cerium oxide particulates) 2 (carbon particulates), 3 (iron oxide particulates) and 4 (glass beads) of PEIGNIER.

It is submitted that PEIGNIER does not render claims 1, 4 and 14 obvious, under 35 U.S.C. § 103(a) and allowance of these claims is respectfully requested.

The Examiner has stated that "Peignier does not specifically teach the [Applicants'] suspension . . ." and that GELLENBECK "teaches that lutein and lycopene are water insoluble pigments . . . and Mae teaches coenzyme Q10 is a water insoluble substance." **Arguendo**, if a person of ordinary skill in the art would be led to combine these references, that combination would not lead to Applicants' invention which does not use a mixture of xanthan gum and carob gum stabilizer, but, on the contrary, restricts the suspension whereby an additional component which effects the basic and novel characteristics of the suspension is excluded.

However, why would one of ordinary skill in the art combine PEIGNIER with GELLENBECK and MAE when the primary reference primarily deals with inorganic pigments,

abrasives, etc. and not with the nutrients of the secondary and tertiary references. In re
Dembiczak 175 F.3d 994, 999-1000, 50 USPQ2d 1614, 1616-18 (Fed. Cir. 1999).

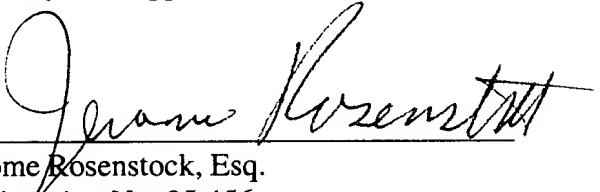
It is respectfully submitted that claims 1, 4 and 14 are not rendered obvious in view of
PEIGNIER, GELLENBECK and MAE, when each is taken alone or in any combination.

Allowance of claims 1, 4 and 14 is respectfully requested, as well as claims 3, 5 and 6.

The Examiner is hereby authorized to call the undersigned attorney of record
“collect” on any matter connected with this application. The telephone number is 212-588-0800.
In the absence of the undersigned attorney of record, the call will be accepted by any attorney
empowered in this application.

Respectfully submitted,

FROMMER LAWRENCE & HAUG LLP
Attorneys for Applicants

By: 
Jerome Rosenstock, Esq.
Registration No. 25,456